BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

HM AND FATHER, JM,

PETITIONER

v. NO. 05-40

WEAKLEY COUNTY SCHOOL SYSTEM

RESPONDENT

FINAL ORDER

FOR THE PETITIONER:

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To protect the confidentiality of the student, they are referred to as "H.M." and the parent is referred to as "J.M."

BEFORE THE COMMISSIONER FOR
THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

HM AND FATHER, JM,
Petitioner,

v. **DOCKET NO.: 05 - 40**

WEAKLEY COUNTY SCHOOL SYSTEM,
Respondent.

FINAL ORDER

THIS MATTER was heard on June 26th and 27th, 2007 before William Jay Reynolds. Administrative Judge for the Commissioner for the Department of Education, Division of Special Education. Marcella G. Fletcher-Derryberry represented the Petitioners. Jason M. Bergeron represented the Local Education Agency ("LEA"), the Weakley County Schools ("WCS"). This contested hearing was held in the Board Room of the Administrative Offices of The Weakley County School System at Dresden, Tennessee.

The Issues in this case were as follows:

1. Whether the LEA failed to refer, evaluate, and identify a child with a disability and provide an appropriate Independent Education Plan ("IEP"), which is a denial of a Free and Appropriate Public Education ("FAPE").

2. Whether the LEA failed to evaluate, develop and provide an appropriate IEP when placing H.M. in special education as "Health Impaired" for homebound services which resulted in a denial of FAPE.

3. Whether the LEA failed to inform the Parent, upon his request for a special education evaluation, that his child was being served in special education which resulted in a denial of FAPE.

4. Whether the LEA failed to evaluate H.M. and additionally failed to provide procedural due process to the Parent or Student when ending IEP services for H.M. in concurrence with the practice of the Weakley County Schools ("WCS") for all homebound students prior to this date which resulted in a denial of FAPE.

5. Whether the LEA failed to inform the Parent of his procedural due process rights including, but not limited to, the right to an independent evaluation in the event that he disagreed with the denial of eligibility or with WCS' psychological evaluation, which resulted in a denial of FAPE.

6. Whether the LEA failed to inform the Parent of the procedural requirements for parent seeking reimbursement from a school system for a unilateral placement, which resulted in a denial of FAPE.

7. Whether the LEA failed to provide, or offer, FAPE to H.M. resulting in the Parent's unilateral placement in a private residential setting for H.M. to receive FAPE.

8. Whether the LEA is obligated to pay for the residential placements which did provide FAPE to H.M.

9. Whether the LEA is obligated to pay for the related costs associated with the residential placements that were required as a part of H.M.'s IEP.

10. Whether the LEA failed to provide Parent access to a full opportunity to present his case by refusing to provide school employees as requested witnesses and by failing to provide requested documentary evidence at the Parent's Due Process Hearing for H.M.

FINDING OF FACTS

1. The student ("H.M.") was 18 years of age. She earned grades ranging from As to Cs through the first semester of her freshman year in high school.
2. In the fall of 2003, she entered her freshman year at Dresden High School in Weakley County. During her second semester of her freshman year, H.M. experienced difficulty at Dresden High School thereby resulting in her transfer to Weakley County's "Keep Hoping" program.
3. In the fall of 2004, H.M. began her sophomore year at Westview High School in Weakley County. Although H.M. was absent periodically, her teachers did not observe her as an emotionally disturbed student or otherwise a student in crisis; indeed, several of her teachers noted that H.M. "was happy...interacted socially with peers, and...appeared interested in her personal appearance," she "interacted socially and appropriately with her peers; she appeared to have friends [and] there appeared nothing out of the ordinary in her behavior," she was "quiet and did the work that was assigned to her," and she "frequently laughed and smiled [and she] got along well with other students and appropriately interacted with her peers." H.M. visited the school counselor at Westview High School and discussed her feelings with them, but school counselor Cathie Holmes testified that "[s]he came more often to our offices

to talk or just to sit, just to kind of get her composure, or whatever. Generally, there was a pattern of that, that I had some concerns about [-H.M. often visited during her biology class, as she did not like that class]."

4. After the Fall Break, H.M. refused to return to school. The school system subsequently received a homebound application signed by Doctors Wood and Williams recommending that H.M. receive a temporary homebound education based on her "increased anxiety."

5. On November 23, 2004, J.M. –H.M.'s father –met with the school personnel to discus the recommendation for H.M.'s homebound education; the school system initiated the procedures for a homebound education on that date and provided J.M. with his legal rights pursuant to *IDEA*. J.M did not disagree with the placement, although he informed the schools system that he was contemplating a residential placement for his daughter. The parties agreed that if he did not pursue this option it would be appropriate that they reconvene to discuss whether H.M.'s homebound education should continue once the second semester started.

6. In 2004, when the issue of a homebound education first arose for H.M., Weakley County's policy was to "place [a student] on homebound through special education" upon the recommendation from a medical doctor that a homebound education be provided for that child.

7. H.M. was a student in the Weakley County Schools ("WCS") and attended Westview High School in the tenth grade before becoming physically unable to attend, which ultimately resulted in her residential placement.

8. H.M. has suffered from Depression and Post Traumatic Stress Disorder since nine years of age.

9. H.M. has a history of taking medications for her mental health needs including the time she was a student with the WCS and as documented in her school records.

10. H.M. has had a history of repeated problems in school, including a stay at the Keep Hoping Program in WCS.

11. H.M. attended Westview High School in the WCS for her tenth grade in 2004-2005. She experienced emotional problems during the first semester, resulting in her inability to return to school after fall break in October 2004. Her Psychiatrist requested homebound services for her on November 8, 2004.

12. At that time, the WCS determined her eligible for special education as "Health Impaired" based on the diagnosis of her doctor as PTSD and Major Depression, but did so absent any evaluations or testing.

13. At the November 23, 2004 IEP meeting, the Parent stated his daughter needed residential placement. The IEP minutes states, "(student's) father is trying to place her in a residential facility." Parent was unaware that this meeting placed her in a special education. He was under the impression that the purpose of the meeting was simply to obtain homebound services. Parent answered in response to Ms. Derryberry's questions, "Q. Did you realize at that meeting that they were putting her in special education? A. No, ma'am. No, I did not."

14. Not one of H.M.'s teachers was present at this IEP meeting. The only teacher present was the homebound teacher, Ms. Pat Bradberry, who had not met H.M. as of this date. Ms. Bradberry is not certified in special education. Further, the IEP was developed without an evaluation or any testing and without developing any behavioral goals that addressed her mental health needs as listed on her homebound application. There were no present levels of functioning on her IEP.

15. H.M. was provided homebound services for three hours a week, but she made no educational progress. The homebound teacher, Ms. Bradberry, recommended she discontinue homebound as H.M. was failing every class.

16. Ms. Bradberry was on the Petitioner's witness list but was not made available at the hearing in violation of *Tenn. Administrative Rules and Regulations*, Rule 0520-1-9.14(III) which states, "LEAs shall ensure the availability of all LEA employees called as witnesses." Further, Counsel for WCS stated that he did not have to provide the school employee witnesses unless they were subpoenaed. In response, Ms. Derryberry stated, "Yes. It is your responsibility to provide school employees at a due process hearing." Mr. Bergeron responded, "If you're not gonna issue a subpoena, then it's not my, it's not my loss. Do your own work. I mean, for God's sake, Your Honor, this is ridiculous. I'm sick of being impugned like we're doing something wrong. There's been no subpoena by petitioners." While in fact, the WCS were responsible for providing the schools employee witnesses that the Parent had timely requested. Refusal to provide the school employee witnesses is a

denial of procedural due process of *IDEA* and results in substantial harm as it interferes with the Parent's opportunity to be afforded due process and to present his case in a Due Process Hearing.

17. The Parent of H.M., not realizing his daughter was already in special education, requested the school conduct an evaluation to determine if his daughter was eligible for special education services. The Special Education Director, Sue Moor, sent him a letter on December 6, 2004, advising him of the upcoming evaluation and the need for him to sign the Permission to Test form.

18. Parent signed the Permission to Test form on December 9, 2004, while H.M. was still in the Weakley County Schools on an IEP for homebound services.

19. At no point in the process did anyone from the WCS advise the Parent that his daughter was already in special education. JM responded to Ms. Derryberry's question, "Q. When you asked for her to be evaluated on December 6th for special education evaluation, did anyone tell you that she was in special education? A. No ma'am. Q. JM, would that have made a difference to you if you had known she was in special ed already? A. Well, yes, it would. I would have not asked for special ed, another IEP meeting to classify her as special ed if she was already in special ed."

20. Ms. Bradberry, the homebound teacher, recommended that H.M not continue with homebound as she had passed no classes while working with her. After H.M. was making no educational progress on the homebound IEP and had failed every subject the first semester, as after the request for a special

education evaluation from WCS, the Parent, in an attempt to keep H.M. from being truant or failing for the entire year, enrolled his daughter in Gateway Christian Schools. Parent was hopeful that the upcoming evaluation from the school would identify his daughter as special education and he would be able to obtain the help that H.M. needed. Gateway Christian Schools is similar to the homebound that the WCS had been offering with the exception that the student would visit the Gateway Christian School office once a week and take an exam over the material covered.

21. During this time the WCS conducted its evaluation and an IEP meeting was held on February 11, 2005.

22. On the Notice of the IEP Meeting, WCS checked that H.M. had been referred for an "initial evaluation." Ms. Bucy, WCS' school psychologist, stated she considered this to be an initial evaluation. She stated further that she found no documentation in H.M.'s records which suggests she had an evaluation when she was "Health Impaired" and on an IEP for homebound. She also stated the process for determining eligibility for special education did require an evaluation. Additionally, Ms. Moore, the Special Education Director, stated that this was the same process for all homebound students prior to this case.

23. The IEP meeting of February 11, 2005 was recorded by the WCS. The tape was requested by the Parent as part of the discovery request for the Due Process Hearing but was never provided. Ms. Moore, the WCS' Special Education Director, stated that she had found it and gave it to the WCS' attorneys. Ms. Moore stated in answering Ms. Derryberry's questions, "Q.

What happened to the tape? A. I do not know. I gave it to one of the initial attorneys and I don't know. Q. So you gave it to your attorney? A. Yes. Q. Did you listen to it? A. Yes, about two and a half years ago." The Court ordered the WCS' Counsel to produce the tape and file it as a late filed exhibit to be known as Exhibit #11. The transcript shows, "(Cassette—NEVER PRODUCED TO REPORTER)" (Tr. V. II, P. 431). Further, the Court advised, "If you don't produce the tape, then I am likely to assume the tape was most favorable to the petitioner." The court draws the inference that the contents of the missing tape are adverse to the Respondent's case.

24. At the February 11, 2005, IEP meeting, the team determined H.M. did not satisfy the requisite criteria for special education as "Health Impaired" or "Emotionally Disturbed."

25. The WCS staff failed to advise the Parent that he had the right to disagree with the denial of eligibility and ask for an independent evaluation.

26. At this meeting, the WCS determined that: "H.M.'s emotional difficulties appear to be situational, rather than consistent, in all aspects of her life." The team further recommended the Student continue to be home schooled and consider entering public school once more the following fall semester.

27. Parent expressed his concern this would not be sufficient and feared H.M. would need residential treatment, as was also noted in Ms. Bucy's report. Ms. Bucy writes, "Also, in previous contacts with school personnel, J.M. had indicated the residential facility he was considering for H.M. required a comprehensive evaluation." The WCS staff failed to advise him he would

need to provide written notice to the WCS if he desired to seek reimbursement for the residential placement. Ms Bucy, the school Psychologist, stated in answering Ms. DerryBerry's questions, "Q. At this meeting do you recall if you, or anyone at this meeting, said to JM, if you're going to seek reimbursement for residential placement for your child you have to provide written notice to the school system? A. No, I did not. Q. Okay. Did you hear anyone else say that? A. Not that I recall."

28. One month after this February IEP meeting, H.M. ran away from home and was admitted to Three Springs Residential Treatment Center on March 11, 2005, where she remained until July 2005.

29. H.M. received her education in a residential mental health setting where the goals and objectives addressed the behaviors: - inability to interact socially with her peers, -withdrawal, -depression, -somatization, and -anxiety, which she presented at WCS. Cathie Holmes, H.M.'s counselor at Westview High School stated in answering Ms. Derryberry's Questions,

    Q. Did you see a decline in her output, say, academically as that semester progressed?

    A. Only by what the teachers were telling. As her counselor they would come to me.

    Q. They'd say she was doing poorly, doing less?

    A. They were just concerned and they, and I talk to several students academically if there are some drops in their grades. . .

    Q. Were you at the meeting when they recommended homebound?

A. I think I was ill that day and my co-worker was there.

Q. When you came back from that time and found that H.M. was homebound based on the psychiatric report, were you surprised?

A. Surprised that she was homebound?

Q. Yes.

A. I knew she was having some problems in school so, you know, I'm sure that was the next step that they were looking into.

30. Three Springs Residential Center relied on Ms. Bucy's psychological report in determining that H.M. met the criteria for this residential facility.

31. When she became a danger to herself and others, she was transferred to Three Springs, New Beginnings which is a sister facility to her previous location.

32. At this time, the Parent hired an Educational Consultant, Dr. Andrew Erkis, for Two Thousand and No/100 ($2,000.00) Dollars to help find an appropriate placement for H.M.

33. Shortly thereafter, H.M. was transferred to High Frontier High School in Ft. Davis, Texas, which was better suited to address her needs. Dr. Andrew Erkis stated the reasons for this selection for H.M. is response to Ms. Derryberry's questions. He stated:

Q. Well, I want to go back to something you said in your assessment. You said that Three Springs was a good facility, so JM on his own did the best he knew how. But by the same token, you said it was more for behavioral problem children, less mental health. Can you talk a little bit about H.M.'s mental health records, or needs that you

saw? Did you see her more emotionally disturbed than behaviorally disordered?

A. Well, yeah. I think it's pretty clear that she had significant symptoms that were consistent with the post-traumatic stress disorder. The team providers that were working with her were pretty clear about that and depression. And she also had some AXIS II features, some personality traits, personality disorder traits. She was cutting. She was acting out a lot. And she was responding to a structured, nurturing environment in a way that wasn't positive which suggested she didn't have the ego strengths to deal with that type of an intervention. So, yes, I would say clearly she's got significant mental issues, and really, retrospectively, we really can tell that because a program designed to work with kids in a very structured kind of behavioral way wasn't effective.

Q. And reviewing her records, did it appear to you that she had had this problem for quite some time?

A. Yes.

Q. A period of time. At least a year?

A. Yes.

Q. Okay. Okay. Tell us how you matched her to High Frontier.

A. Well, what I did was I talked with JM about why I thought residential treatment level of care was appropriate. Some of the things that we just talked about I talked with him and said that I would like to look at places that are more set up to work with kids who have things like PTSD and issues like cutting, and depression, and I actually gave him – I, at that point, made several phone calls around the country to programs to try to get a sense for who had beds and to see what the menus were looking like so that I could help kind

of fine tune the process and then I talked with JM about three programs that I thought he should look at. ...

34. H.M. was certified as ED at High Frontier based on the same behaviors and mental health problems identified by the school psychologist at WCS. Dr. Jerry Mitchell, the School Psychologist at High Frontier, ultimately relied on the psychological and psychiatric reports from Three Springs, Kathy Bucy's psychological report from WCS, and his interview with H.M. to determine H.M.'s eligibility as ED for special education services. Dr. Mitchell stated in answering Ms. Derryberry's questions:

> A. As I first met her, she was rather subdued. She was open about and volunteered information readily. She had, I would say, if you would, that she had a poor self image, if that's what your asking. She had not succeeded at anything in quite some time. She had been traumatized, and to go back and to specify what I'm talking about, she reported that she had been sexually abused. She'd had school problems, she'd been depressed, she had flashbacks of abuse, she had nightmares and that's the condition I found when I first interviewed her.
>
> Q. Did she indicate whether that had been going on for quite some time?
>
> A. Since nine years of age.

35. High Frontier developed an IEP. She made slow but steady progress from her entrance at High Frontier on July 26, 2005, and until her graduation with honors from Frontier High School on May 22, 2007. H.M. received an

educational benefit from High Frontier which provided her the ability to obtain acceptance to college. Her Father described her progress at High Frontier in answering questions from Mrs. Derryberry. He stated:

> Q. Tell me about – Rather than looking at documents, tell us about your daughter's progress at High Frontier.
>
> A. Well it's nothing short of amazement, more than—as much and more than I could ever hope for. She has gone from a child that was non-functioning and had no future, no hope, to a now calm and relaxed young lady. Already completing high school with honors, nominated to the Who's Who American High School Students, and continues to improve. She has been accepted and enrolled to Murray State. It's just a change from daylight to dark. It's not the—
>
> Q. Is she on any medication now?
>
> A. None whatsoever.
>
> Q. How long has she been free of medication?
>
> A. Going on a year.

36. H.M., at the time of hearing, was an 18-year-old student who graduated from High Frontier High School in Fort Davis, Texas, on May 22, 2007. [On leaving High Frontier in July 2007, she attended Murray State University]

37. H.M. had been at High Frontier since July 2005. This is a residential placement for students who are identified as Emotionally Disturbed ("ED") that need special education in a residential setting.

38. The teachers at High Frontier are provided by the local school district and are

all certified in special education.

39. All students at High Frontier are identified as needing special education with the primary special education certification of ED.

40. H.M. had previously been at Three Springs Paint Rock Valley, which is a mental health residential treatment facility in Trenton, Alabama, from March 11th until June 29th, 2005.

41. The costs for High Frontier from July 2005 until graduation on May 22, 2007, were $134,804.45.

42. The related costs for H.M. to be at High Frontier included travel to and from the school for Parent and/or H.M. which required a flight to El Paso, Texas, as well as an additional 300 miles one way to get to the school. These costs consisted of eleven trips for the Parent and/or H.M. The plane ticket cost an average of $300. [Eleven (11) plane tickets at $300.00 = $3,000.00 6600 miles at 42.5 cents a mile=$2,805.00; (Total Related Costs = $5,805.00)].

43. The costs for Three Springs were $33,544.03.

44. The related costs for H.M. to be at Three Springs involved the Parents making three trips of 259 miles one way to visit H.M. [total of 1554 miles at 42.5 cents a mile (Total Related Costs =$660.45)].

CONCLUSIONS OF LAW

The Supreme Court set the standard for private school reimbursements in *Florence County School Board v. Carter*, 510 U.S. 7 (1993). The Sixth Circuit, quoting

the Supreme Court, states in K*nable v. Bexley City School District*, 238 F.3d 755, 770-71 (6th Cir. 2001),

> "The Court in Florence County expressly rejected this argument, however, and held that HN28 "once parents prove that the school district failed to offer an appropriate program, parents are entitled to reimbursement for private school placement so long as the placement was reasonably calculated to provide educational benefits."

When defining a test for the denial of a FAPE in *Bd. Of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 n. 27, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Supreme Court noted that the first step of the inquiry includes the requirement that the court "determine that the State has created an IEP for the child in question." The Fourth Circuit has agreed, holding that the failure to formulate an IEP, as a result of procedural error or otherwise, constitutes a clear denial of a FAPE. *See, Tice By and Through Tice v. Botetourt C. Sch. Bd.*, 908 F. 2d 1200, 1207(4th Cir. 1990), (stating that failure to implement an IEP left "simply no question" as to denial of FAPE); *Gladsby by Gladsby v. Grasmick*, 109 F.3d 940, 950 (4th Cir.1997) (explaining that "[c]entral to the provision of free appropriate public education is the development of an IEP," and finding a violation of the IDEA because BPCS failed to develop an IEP for the student in question).

> There are two parts to a court's inquiry in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the

> procedures set forth in the IDEA. *Bo. Of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *McLaughlin v. Holt Pub. Sch. Bd. Of Educ.* 320 F.3d 663. 669 (6th Cir. 2003). Second, the court must assess whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07, 102 S.Ct. 2034; *McLaughlin*, 320 F.3d at 669. "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Rowley*, 458 U.S. at 207, 102 S.Ct. 3034; accord *Kings Local Sch. Dist., Bd. Of Educ. v. Zelazny*, 325 F.3d 724, 729 (6th Cir.2003). Parties challenging an IEP have the burden of proving by a preponderance of the evidence that the IEP devised by the school district is inappropriate. *Zelazny*, 325 F.3d at 729; *Dong ex rel. Dong v. Bd. Of Educ. of the Rochester Cmty. Sch.*, 197 F.3d 793, 799 (Cir.1999).

The Ninth Circuit clearly states the failure to appropriately develop an IEP is more than the measure of a student's academic progress and can result in a denial of F.A.P.E. The Court states in *W.G v. Bd. Of Trustees of Target Range Sch. Dist.* No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992):

> When a district fails to meet the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide a FAPE. The significance of the procedures provided by the IDEA goes beyond any measure of a child's academic progress during the period at issue. As the Court in Rowley said, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation" at every step "as it did upon the measurement of the resulting IEP." Rowley, 458 U.S. at 205-206, 102 S. Ct. at 3050-51.

The WCS failed to timely evaluate and identify H.M. as a student which is ED despite Parent's request and Parent's future placement of H.M. in a school for ED students. It took H.M. over two years to complete the program and graduate from high school at this specialized school for ED students. The failure to follow procedural safeguards resulted in there never being a certification of ED for this child and an appropriate IEP was never developed being by WCS. These procedural violations are at the heart of IDEA: (1) failure to identify and evaluate fully in a timely manner; (2) failure to develop and provide an IEP which is reasonably calculated to provide an educational benefit and (3) failure to provide the parents with procedural due process rights when services are denied. As noted above, clearly these issues are crucial to IDEA and, if violated, result in a total denial of FAPE. The Parent sought help from the WCS for his

daughter. When they offered nothing, the Parent sought help in a private residential placement. The private placement used the WCS' own psychological evaluation to certify H.M. as an ED special education student. Parent told the WCS that he feared his daughter needed residential placement. It appears WCS made the choice not to identify this student to avoid the risk of liability for the costs associated with a residential placement. Further, WCS did not inform the Father, when he stated the need for residential placement to them on more than one occasion, that if he wanted to seek reimbursement from the WCS he would need to give them written notice. WCS elected to deny that she had a problem and caused the Parent to search for a remedy to discover the help his daughter needed in order for her to receive an education. While denying her eligibility into special education, WCS also failed to inform the Parent that he had the right to an independent evaluation. Compounding WCS failure to identify H.M. as a child with a disability was the failure to provide any procedural safeguards when denying her services.

The law governing the initial evaluation I IDEA is very clear. The Parent or any school personnel may make a referral for a special education evaluation. See, 20 U.S.C.A. 1414, which states:

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

(A) In general

A. State educational agency, other State agency, or local educational agency **shall** conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b) of this section, **before the initial**

provision of special education and related services to a child with a disability under this part.

(B) Requested for initial evaluation

Consistent with subparagraph (D), **either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability**.

(C) Procedures

....

(II) **To determine the educational needs of such child.**

(Emphasis added)

In this case, the Parent asked for the evaluation while H.M. was on homebound because her psychiatric problems prevented her from attending school. The WCS failed to inform the Parent that H.M. was already in special education as "Health Impaired" when he asked for this evaluation. Further, WCS placed H.M. in special education without any evaluation or testing and determined her to be "Health Impaired." WCS failed to develop any goals or objectives that addressed her issues that were keeping her from being able to attend school. After H.M. failed every subject on homebound, the Homebound Teacher, Ms. Bradberry, recommended to the Parent that homebound be discontinued as it was clear that it was offering no remedy. There was no exit from special education. There was no notice to the Parent that H.M. would be leaving special education as there was no notice that she was in special education. There was not an exit IEP meeting as required by IDEA. 20 U.S.C.A. 1414, states:

(5) Evaluations before change in eligibility

(A) In general

Except as provided in subparagraph (B), a local agency shall evaluate the child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

When WCS finished their own testing of H.M., after she had already been in and out of special education without notice, they determined that she did not satisfy the criteria for special education in any category including the category that she had been placed in just one month prior. Instead, they determined her depression and other mental health problems were situational. At no point during this IEP meeting, which was allegedly taped by the WCS, did the staff inform the Parent that he had the right to an independent evaluation. Further, at no point in this meeting did the WCS staff inform the Parent that if he withdrew H.M. and placed her in a private residential setting with the intention of receiving reimbursement from the school that it would be required that he provide the WCS written notice within ten (10) days. This occurred despite the Parent stating that, for some time, he thought his daughter might need residential care.

IDEA allows exceptions to the Notice requirement. Tenn. Administrative Rules and Regulations, Rule 0520-1-9-.16, which mirrors IDEA, states the exceptions as follows:

I. Exceptions to the Notice Requirement

1. Notwithstanding the notice requirement, the costs of reimbursement may not be reduced or denial for failure to provide the notice if:

(I) The parent is illiterate

(II) Compliance with the placement would likely result in physical or serious emotional harm to the child;

(III) The school prevented the parent from providing the notice; or

(IV) **The parents had not received notice of the notice requirement**

(Emphasis added)

At no point in the last IEP meeting or prior meetings did any WCS' employees call attention to these requirements to the Parent. Therefore, the Parent would have no knowledge that a written statement is required from the Parent before removing their child and seeking reimbursement. This Parent and Student lacked any knowledge she had been in special education before. The only proper IEP meeting the Parent had attended was the illegibility meeting where the WCS denied eligibility to his daughter. H.M. was not offered any services; it was recommended she might try coming back to Westview High School the following fall and they would consider adding counseling to see if that would help. This meeting was in February. IDEA sets out strict procedural guidelines for schools to provide parents when denying services to students. See U.S.S 1414(d)(1)(A).

If the procedural violations have resulted in substantial harm to the student or his parents, relief should be granted. *Metro. Bd. Of Public Educ. v. Guest*, 193 F.3d 457, 464-65 (6th Cir. 1999). "Substantial harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process. *See W.G. v. Bd. Of Trustees of Target Range Sch. Dist.* No. 23, 960 F.2d 1479, 1484 (9th Cir. 1992). In addition, procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under IDEA. *See Babb v. Knox County Sch. Sys.*, 965 F. 2d

104 , 109 (6th Cir. 1992); W.G., 960 F.2d at 1484." *Knable v. Bexley City School District*, 238 F.2d 104, 109 (6th Cir. 2001). The procedural violations of failure to inform Parent of the right to disagree to a denial of eligibility or the right to an independent evaluation when disagreeing with the School's evaluation which denied his child access to any service would result in a total denial of FAPE. Further, procedural violations that go to the heart of Due Process is the refusal of the WCS to provide school employee witnesses and requested documentation when the Parent is attempting to prove a claim under IDEA. Not only did the child fail to be served by WCS, but the Parent was denied at every turn the opportunity to fully participate in the IEP process. The denial of the opportunity of the parent to participate in the IEP process is a cornerstone of IDEA. These procedural violations constitute a denial of FAPE as H.M. was denied an educational opportunity.

Once a denial of FAPE is proven, the next prong is to determine if the private placement provided educational benefits. The Sixth Circuit quotes the standard of the Supreme Court in *Florence County*. The Sixth Circuit, quoting the Supreme Court in Florence, states in *Knable v. Bexley City School District*, 238 F. 3d 755, 770-71 (6th Cir. 2001):

> "Once parents prove that the school district failed to offer an appropriate program, parents are entitled to reimbursement for private school placement so long as the placement was reasonably calculated to provide educational benefits."

In the case before this court, it is clear that the placements the Parent chose not only provided educational benefits, but also allowed H.M. to make meaningful educational progress until she was finally able to successfully graduate from high school

with honors. She did more than graduate; she was accepted to college where she is currently attending. At WCS, she could not even pass homebound, much less attend the high school successfully. WCS made no offer of FAPE or of any schooling to H.M.

The student was eligible for special education as Emotionally Disturbed since the fall of the tenth grade while she was a student at West High School in Weakley County Schools and that District failed to provide a Free Appropriate Public Education to her due to the District's direct failure to identify the student as disabled. The District, for a very short period of time, did find the student to be an eligible student and in need of special education when she was classified as "Health Impaired." However, the limited services of homebound were insufficient in nature to provide a FAPE for the student. The District arbitrarily, without following appropriate procedures, dismissed the student from special education because the services were not working. During this period, the District overlooked the correct procedures for placing students on Homebound and used special education as a scapegoat for failing to follow correct regulations. The footnote of Respondent's attorney (Footnote 1, page 3, Respondent Weakley County Schools Reply Brief) brief understated the seriousness of the violations when he wrote, "While the school system's policy in effect at that time was concededly unorthodox, it only served to accommodate the student's needs as quickly as possible." When read with IDEA and state law and regulations as reference, it clearly states the District chose to shrink from their responsibilities under the law and do what they thought was easy as opposed to that which was legally correct. The district chose to place this student in special education instead of providing homebound through regular education and, therefore, this student is entitled to all of the procedural safeguards of the IDEA. Failure to provide complete due

process rights to the student's father causes the district to fail the FAPE provision by itself, but the District continued to slide down the path of noncompliance and denial of FAPE for many additional reasons.

The District's attempt to avoid their responsibilities to provide homebound through general education and to make this student disabled without appropriate evaluations, as well as their failure to provide services necessary for the student to work in the general education curriculum, establishes the beginning of a long failure of FAPE. This slide only continued for the District when it failed to follow correct procedures to either remove her from special education or to find alternative types of services for the student. Further, the slide out of compliance hastened as the District failed to notify the Parent of his rights, including a right to an Independent Educational Evaluation. Finally, the District's attempt to keep witnesses from testifying by failing to have them available as required by the state standards further demonstrates the District's continued denial that they were out of compliance. This District has failed its basic responsibilities of IDEA including identification, evaluation, notification of procedural safeguards, and the provision of FAPE to this disabled student. As a result of all these substantive and procedural violations, the LEA has failed to satisfy its statutory obligations to this student and her Father. As a result, the Father was justified in unilaterally seeking an appropriate education outside of the school district in order for his daughter to receive a FAPE. The two private schools the father was forced to discover without the assistance of the District has provided his daughter with a FAPE which the Weakley County Schools failed to obtain.

ORDER

IT IS THEREFORE ORDERED:

1. The Weakley County School System shall reimburse the Parent for the cost of tuition for Three Springs in the amount of $33,804.45 plus the costs of travel for four trips of 259 miles one-way at the rate of 42.5 cents a mile ($660.45) to and from Three Springs in Trenton, Alabama for total costs of $34,204.48. This amount shall be paid within thirty (30) days of the date of this Order.

2. The Weakley County Schools shall reimburse the Parent for the cost of $2,000.00 for the Educational Consultant, Dr. Andrew Erkis, for his assistance in finding the appropriate placement for H.M. This amount shall be paid within thirty (30) days of the date of this Order.

3. The Weakley County Schools shall reimburse the Parent for the cost of tuition for High Frontier in the amount of $134,804.45, plus the costs of travel for eleven trips to and from High Frontier in Ft. Davis, Texas for the Father and/or H.M. which required a flight of approximately $300.00 round trip and the further travel of 300 miles one way to the facility at the rate of 42.5 cents a mile ($5,805.00) for total costs of $140,609.45. This amount shall be paid within thirty (30) days of the date of this Order.

4. The Petitioner is the Prevailing Party regarding all issues raised.

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the Petitioner resides or may seek review in the United States District Court for the District in which the School System is located. Such Appeal or review must be sought within Sixty (60) Days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of the *Tennessee Code Annotated*, § 49-10-601.

ORDERED AND ENTERED, this the 22ND Day of September 2008.

STATE OF TENNESSEE
DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

BY: _____
WILLIAM JAY REYNOLDS
ADMINISTRATIVE JUDGE
55 COURT STREET, SUITE A,
SAVANNAH, TENNESSEE
(731) 925-7000